Mediation in Special Education: Two States' Experiences

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I. INTRODUCTION

In 1982, following four years of research, Milton Budoff and Alan Orenstein published a study of the effects of applying due process safeguards to special education.[1] Their conclusion was that the formal due process hearing system failed to resolve disagreements between parents and schools over appropriate programming for the special needs child. In a concluding chapter, the Director of the Massachusetts State Department of Education's Bureau of Special Education Appeals, pointing to the success of mediation in special education in contrast to the due process hearing, lamented the fact that there had been "little interest at the federal or state level in studying the benefits of a process less threatening, less costly, less adversarial, and more effective" than a formal due process hearing.[2] That lament, although once true, is no longer accurate.

In 1976, Massachusetts became the first state to incorporate mediation into its due process system in special education. Since then a growing number of states, in their efforts to comply with the requirements of the Education for All Handicapped Children Act (P.L. 94-142),[3] have included some form of mediation as part of their appeals process.

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1. M. BUDOFF, A. ORENSTEIN & C. KERVICK, DUE PROCESS IN SPECIAL EDUCATION: ON GOING TO A HEARING (1982) [hereinafter cited as BUDOFF].

2. *Id.* at 323.

3. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C. §§ 1232, 1401, 1401 notes, 1405, 1406, 1411, 1411 notes, 1412, 1412 note, 1413, 1413 note, 1414-20, 1453 (1975)).

As the use of mediation has grown, so has the interest in studying the process and its utility. In 1983, the National Institute for Dispute Resolution awarded a grant to the Center for Community Justice (CCJ) to conduct two case studies. These case studies were to examine the use by governments of non-traditional methods of resolving disputes between individuals and institutions. It was agreed that one of the case studies would examine the use of mediation by state education agencies. What follows is CCJ's report on that research.[4]

II. PUBLIC LAW 94-142: THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

Arguably, one of the most significant events in American educational history occurred in 1975, with the passage by Congress of the Education for all Handicapped Children Act. That Act was the culmination of years of effort by parents and advocacy groups. Earlier victories had occurred in the courts[5] and state legisla-

4. Two states were selected for study. One was Massachusetts because it has had the most experience with the process and continues to handle a high volume of appeals. The second state chosen was California because mediation has been in use for three and one-half years and there is a relatively high volume of appeals.

Initial research centered on the federal statute, Public Law 94-142. The statute, regulations, and case law interpreting the statute were reviewed. Officials of the Department of Education, and representatives of the Children's Defense Fund, the Parent Educational Advocacy Training Center, and the National Association of State Directors of Special Education, were interviewed.

In Massachusetts, we interviewed: a member of the State Board of Education; the Associate Commissioner for Special Education, Massachusetts State Department of Education; and the Director and Assistant Director of the Bureau of Special Education Appeals, Massachusetts State Department of Education. In addition, we interviewed: local school officials; mediators; parents; two long-term observers and researchers in due process in special education; lay advocates; two attorneys, one who represents parents and one who represents school districts; and representatives of the Federation for Children with Special Needs, Massachusetts Advocacy, Inc., and the State's Office for Children. Copies of mediation agreements, with the names of the parties removed, were reviewed. We observed three mediations with the consent of the disputants, who were interviewed after the mediation sessions.

In California, we interviewed the following: the Administrative Assistant to the Director of the Office of Special Education, California State Department of Education; the former Director of the Due Process Hearings Unit, who is now the federal liaison for the State Department of Education; the Director of the Due Process Hearings Unit, who is also the Assistant Chief Counsel for the State Department of Education; and the Legal Assistant in the Due Process Hearings Unit. In addition to observing one mediation and interviewing the participants afterward, we interviewed: mediators; parents; private lay advocates; local school officials; representatives of Team of Advocates for Special Kids (TASK), Protection and Advocacy, Inc., and Community Alliance for Special Education (CASE); and an advocate from one of the state's regional centers.

Each state initially agreed to provide us access to complete mediation files; however, such access was not ultimately available because of confidentiality issues and the difficulty inherent in removing all identification for our review. However, we were able to observe mediations and examine numerous samples of mediation agreements, and review statistics provided by both states.

5. *See* Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972). Both cases were eventually settled by consent decrees which specified elaborate measures governing

tures,[6] but with the enactment of Public Law 94-142, special education throughout the country was permanently and dramatically altered, both substantively and procedurally.

One of the most significant changes accomplished by this Act was the extension of due process safeguards to procedures for identifying and educating children with special needs. Henceforth, parents would be directly involved in the education of their handicapped children from the initial evaluation on. If at any point parents were dissatisfied with the local education agency's planning or provision of special educational services, the parents were given the right to contest the plan.

A. *Substantive Provisions of Public Law 94-142*

The purpose of the Education for all Handicapped Children Act of 1975 is "to assure that all handicapped children have available to them . . . a free appropriate public education. . . ."[7] To meet this goal, the Act provides federal funds to state and local educational agencies to assist in educating handicapped children.

To qualify for federal aid under the Act, a state must show that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education."[8] Each state is required to submit a plan, which articulates this policy, and which describes the programs under which the state intends to educate handicapped children.[9]

Under the Act, "free appropriate public education" is defined as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.[10]

"Special education" means "specially designed instruction . . . to meet the unique needs of a handicapped child."[11]

The Act requires that an "individualized educational program"

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the placement or the denial of placement to handicapped children in educational programs.

6. *See, e.g.*, MASS. ANN. LAWS ch. 71B, §§ 1-14 (Michie/Law Co-op. 1978 and Supp. 1985) (enacted in 1972 as part of Chapter 766 of the Acts of Massachusetts General Court).

7. 20 U.S.C. § 1400(c) (Supp. 1985).

8. 20 U.S.C. § 1412(1) (1978 & Supp. 1985).

9. *Id.* § 1412(2).

10. *Id.* § 1401(18).

11. *Id.* § 1401(16).

(IEP) be developed for each handicapped child, to ensure that he or she is receiving an appropriate public education.[12] The child is identified by the parent, or a concerned school official, such as a school nurse, and brought to the attention of the local special education department. The child is then observed by a professional. With permission, testing is performed, and the IEP is developed at a meeting among the child's parents, the child's teacher, various specialists, and a representative of the local educational agency. The plan must contain, among other things, a statement of the child's current educational level, a statement of annual goals, and a description of the specific services to be provided to the child. In preparing an IEP, the goal is to educate the handicapped child with non-handicapped students "to the maximum extent appropriate."[13]

In 1982, the United States Supreme Court issued an opinion that discussed in detail the meaning of a "free appropriate public education."[14] Amy Rowley, the plaintiff in the case, was a deaf first grader. Under her IEP, she was to be educated in a regular first grade class, with the assistance of a hearing aid system to be used by Amy, her teacher, and her classmates. She also was to receive daily instruction from a tutor for the deaf, and instruction from a speech therapist for three hours a week. Amy's parents insisted that she be provided a sign language interpreter in all her academic classes; the school administrators concluded that this was unnecessary. After being denied relief in the administrative process, the Rowleys filed suit in United States District Court.

The district court found that Amy was "a bright, well-adjusted child" who performed "better than the average child in her class and [was] advancing easily from grade to grade."[15] However, the court also found that Amy was "not learning as much, or performing as well academically, as she would without her handicap," because she did not understand much of what occurred in the classroom.[16] The court concluded that Amy was not receiving a free appropriate education because she was denied "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children."[17] The United States Court of Ap-

12. *Id.* § 1412(4).
13. *Id.* § 1412(5).
14. Board of Educ. v. Rowley, 458 U.S. 176 (1982).
15. Rowley v. Board of Educ., 483 F. Supp. 528, 534 (M.D. Ala. 1980).
16. *Id.* at 532.
17. *Id.* at 534.

peals for the Second Circuit affirmed.

The Supreme Court, however, disagreed with the lower courts' definition of a "free appropriate education." The Court stated that Congress' intent in passing the Act was:

> to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child. Noticeably absent from the language of the Statute is any substantive standard prescribing the level of education to be accorded the handicapped children.[18]

In concluding that the Act did not guarantee that each handicapped child would be educated to his or her full potential, the Court relied heavily on the statute's legislative history and two district court cases cited by Congress.[19] According to the Court's interpretation, Congress emphasized that handicapped children should have *access* to free public education. The right to access to free public education, however, "is significantly different from any notion of absolute equality of opportunity. . . ."[20]

The Court concluded that a handicapped child receives a "free appropriate education" if he or she receives "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction," even if the child is not achieving his or her maximum potential.[21] The Court made clear that once this standard was being met, "questions of methodology are for resolution by the States."[22]

In interpreting *Rowley*, the United States Court of Appeals for the Eighth Circuit has ruled that "the Act does not require states to make available the *best* possible [educational] option."[23] A United States district court in Massachusetts has concluded that "where the State is providing the child with an education that is of some benefit to her and is utilizing a minimally acceptable educational approach this court may not interfere."[24]

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18. Board of Educ. v. Rowley, 458 U.S. 176, 189 (1982) (emphasis in original).

19. Board of Educ. v. Rowley, 458 U.S. 176, 192-94, 199 (1982) (discussing Mills v. Board of Educ., 348 F. Supp. 866 (E.D. Pa. 1972)); Pennsylvania Ass'n for Retarded Children, 334 F. Supp. 1257 (E.D. Pa. 1971).

20. Board of Educ. v. Rowley, 458 U.S. 176, 199 (1982).

21. *Id.* at 203.

22. *Id.* at 208.

23. Springdale School District v. Grace, 693 F.2d 41, 43 (8th Cir. 1982) (emphasis in original).

24. Long v. Braintree School Committee, 545 F. Supp. 1221, 1227 (D. Mass. 1982).

B. *Procedural Provisions of Public Law 94-142*

The Act provides procedural due process protections to parents who are dissatisfied with the educational programs prepared for their handicapped children. A state or local educational agency must provide the parents with prior written notice of any proposed change in "the identification, evaluation, or educational placement of the [handicapped] child or the provision of a free appropriate public education to the child."[25] Parents are entitled to bring a complaint about "any matter relating to their child's evaluation or education."[26]

The Act requires that parents be provided an "impartial due process hearing" on their complaint,[27] and the right to appeal to the state educational agency if their hearing is held at the local level.[28] Either the parents or the educational agency may file suit in United States district court, if they disagree with the state agency decision.[29] If the state does not have mediation, the due process hearing takes place when the IEP is rejected, and is adversarial in nature. The disputants give their testimony to a hearing officer who renders a decision concerning what the parties must do to ensure that the child receives a free appropriate public education.

The Act itself does not mention mediation as a means for resolving parents' complaints, nor do the regulations promulgated by the Department of Education to implement the Act.[30] However, a "comment" to the regulations states as follows:

> Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this

25. 20 U.S.C. § 1415(b)(l)(C)(ii) (1978).
26. *Id.* § 1415(b)(1)(E) (1978).
27. *Id.* § 1415(b)(2) (1978).
28. *Id.* § 1415(c) (1978).
29. *Id.* § 1415(e)(2) (1978). However, the Supreme Court recently ruled that parents who prevail in court are not entitled to reimbursement of attorneys' fees spent in the administrative or judicial process. Smith v. Robinson, 104 S. Ct. 3457 (1984).
30. 34 C.F.R. §§ 300-399 (1985).

subpart.[31]

Neither the regulations nor the comments provide any substantive or procedural guidelines for mediation. Interviews with Department of Education officials indicate that the Department maintains a "hands off" posture with respect to mediation. Their only concern is that due process rights not be delayed or impeded.

States have considerable leeway in designing their due process systems, provided that the rights mandated by Public Law 94-142 are included. Some states have hearings at the local level, which in some places include mediation, followed by an appeal to the state level. The two states chosen for this study happen to have state-level hearings, but California previously had a local hearing as the first step of the appeal process.

III. THE MASSACHUSETTS SYSTEM

Massachusetts school districts did not have to scramble to make preparations for compliance with Public Law 94-142. A similar law, on which the federal statute was based in part, had passed the Massachusetts Legislature in 1972 and took effect in 1974. This law identifies special needs children, between the ages of three and twenty-one years, on the basis of their poor school performance and their need for special services, rather than on the basis of diagnostic labels. In addition, the law includes these fundamental concepts:

- Local school districts are responsible for identifying all young people within their jurisdiction in need of special education.
- Each student referred for special education services must be assessed by a multidisciplinary group of professionals using several methods of evaluation.
- An educational program must be developed to meet the special education needs of each student. This individualized program must take into account both the child's weaknesses and strengths, and represent an earnest effort on the part of all participants to provide for both, while removing the child as little as possible from the mainstream of the regular education program.
- Parents have the right and the responsibility to be involved at all points: referral, assessment, planning, and evaluation. Moreover, they must agree to the individualized educational plan and, should changes be made, consent to them. When children reach the age of fourteen, they also have the right to help plan their educational program.
- Each child's progress must be reviewed regularly, and his or her educational plan, and the services provided under it, modified in accordance

31. 34 C.F.R. § 300.506 comment (1985).

with new information.
- The local school district is responsible for providing appropriate special education services and for transporting students to those services.
- The professional personnel charged with the responsibility for implementing special education must have attained specified criteria of professional training. Moreover, the school district must provide continued inservice training to all of its staff concerning the provision of special education services.
- Parents can contest the appropriateness of an educational plan, first before an impartial hearing officer, and ultimately, in court.[32]

Just as it led the nation in creating rights for the handicapped, so too did Massachusetts pioneer in its methods for resolving disputes over those rights. Even before dissatisfaction with the formal due process hearings surfaced,[33] Massachusetts was experimenting with mediation on an informal basis. In 1976, a prehearing mediation stage was formally added to the appeal process. Thus, while most of the nation was trying to come to grips with the impact of Public Law 94-142, Massachusetts was refining the due process aspects of its own revolutionary enactment.

The Massachusetts State Department of Education currently employs six full-time mediators. Each of them is assigned to one of the Department of Education's regional offices. The mediators' prior occupations vary; they include a former priest, a social worker, an actuary, and a prison official. They all appear to be warm, friendly people, generally outgoing in personality.

Most appeals are sparked by discontent with a child's Individualized Educational Program (IEP). Federal and state law require that an IEP be prepared for each special needs child. These programs are prepared by a special education team, in collaboration with the parents, after an evaluation of the child. The program is then submitted to the parents for their final approval. A simple notation on the program by the parents that they do not accept the plan in full triggers the appeal process.

Upon rejection of an IEP, the school forwards to the Bureau of Special Education Appeals and to the appropriate mediator a copy of the rejected IEP. This step must be taken within five days of the rejection. Sometimes the parents simultaneously sign a letter saying that they waive mediation and wish to go directly to a due process hearing. According to the Director of the Bureau, such waivers

32. MASS DEPT. OF EDUCATION, IMPLEMENTING MASSACHUSETTS' SPECIAL EDUCATION LAW: A STATEWIDE ASSESSMENT 4 (1982). *See generally* MASS. ANN. LAWS ch. 71B, §§ 1-14 (Michie/Law Co-op. 1978 and Supp. 1985).

33. BUDOFF, *supra* note 1.

occur in five to ten percent of the cases. The remaining cases are assigned to a mediator. At that point, the mediator contacts the parents to explain the process and to schedule a mediation. In addition, some informal efforts at resolution may be attempted, through telephone conversations with the school and the parents. Assuming these are unsuccessful, a mediation is scheduled.

In the event that mediation does not resolve the matter in dispute, either party may request a due process hearing before the Bureau. The Bureau encourages but does not require the parties to avail themselves of mediation before requesting a hearing. All discussions during the mediation session or prior to it are confidential and privileged. Mediation files are kept separate from any subsequent hearing files.

IV. THE CALIFORNIA SYSTEM

California's Education Code[34] incorporates the federal due process rights for children and their parents concerning special education in the state. The Code states that "all procedural safeguards of Public Law 94-142 . . . shall be established and maintained by each noneducational and educational agency that provides education, related services, or both, to children who are individuals with exceptional needs."[35]Due process hearing procedures may be initiated by a pupil, a parent, or the public education agency under any of the following circumstances:

> (a) There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child;
> (b) There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child; or
> (c) The parent refuses to consent to an assessment of the child.[36]

Here too, conflicts most often arise in connection with the development of the IEP. However, a due process hearing procedure can be initiated at any time by any of the protected parties. A request, generally in letter form, is filed with the state superintendent of education.[37] At the same time as a request is filed with the superintendent, the party initiating the due process hearing

34. CAL. EDUC. CODE §§ 56000-56865 (West 1978 & Supp. 1985).
35. CAL. EDUC. CODE § 56500.1 (West Supp. 1985).
36. CAL. EDUC. CODE § 56501(a) (West 1978 & Supp. 1985).
37. *Id.* § 56502(a).

must notify the other party.[38] The local education agency, within three days of receiving a copy of such a request, must advise the parent of free or low cost legal services and other relevant services available within the parent's geographical area.[39] Within forty-five days after receipt of the written hearing request, the superintendent must ensure that the due process hearing, including any mediation, is commenced and completed and a final administrative decision rendered, unless a continuance has been granted by the mediator or hearing officer.[40]

The Education Code states that it is the "intent of the legislature that the mediation conference be an intervening, informal process conducted in a nonadversarial atmosphere."[41] The mediation conference is conducted prior to the administrative due process hearing; however, it can be waived by either party. Mediation is supposed to be completed within fifteen days of receipt by the superintendent of the request for a hearing.[42]

The mediator may grant continuances beyond the fifteen day deadline. Any such continuance does not extend the forty-five day maximum for completion of the due process hearing and decision, however, unless the party initiating the request for a hearing agrees to such an extension. Any such extension will extend the time for rendering a final administrative decision only for a period equal to the length of the agreed continuance.[43]

Prior to a mediation conference, parents have the right to receive and examine copies of any documents contained in the child's file.[44] The parent also has the right to be accompanied to the mediation by any representative whom he or she has chosen.[45]

The Code gives the district representative, the district superintendent, the county superintendent, or the director of the local education agency (or a designee) authority to resolve any issue. The only restriction is that any resolution may not conflict with state or federal law and must be satisfactory to both parties.[46]

Other Education Code sections state that a mediation con-

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* § 56503(a).
42. *Id.* § 56503(b).
43. *Id.*
44. *Id.* § 56504.
45. *Id.* § 56503(c).
46. *Id.* § 56503(d).

ference "shall be conducted by a mediator knowledgeable in the laws governing special education under contract with the department,"[47] and that the mediation should be held at a time and place that is reasonably convenient to the parent and student.[48] If the mediation is unsuccessful, the mediator prepares a list of unresolved issues, which is signed by the initiating party prior to the conclusion of the mediation. This list then forms the basis for the state level hearing.[49]

Thus, although California statutory law provides more structure to the mediation process than do the governing provisions in Massachusetts, much still is left to the discretion of the superintendent and, in turn, to the due process hearings unit. The current due process procedure, including the mediation component, has been in existence for three and one-half years, and was preceded by a number of other designs. The state's first response to the due process requirements of Public Law 94-142 was a two-step procedure: an initial hearing at the local level, with the right of appeal to the state. The local level hearing was conducted by a three-person panel, one chosen by the parent, one by the school, and the third by the other two panelists. After this system had been in operation for a period of time, it appeared that there was a high level of appeals from the local level hearings on the grounds of fairness. The procedure was changed in 1979 to permit the initiating party to bypass the local hearing for a state-level hearing. Thus, at the state level there were both review officers for appeals from the local panel's decisions, and hearing officers, who heard cases in which the local level hearing had been bypassed.

By 1980, state officials were interested in changing this hybrid to a state-level hearing, and in adding a mediation component to the appeal process. After studying the Massachusetts model, the director of the due process unit decided that mediation should be included within the forty-five day deadline rather than being an entirely separate, interceding preliminary level. In 1980, the state settled on the current process, which gives a fifteen-day deadline to mediation and an additional thirty days within which any due process hearing must be completed and a decision issued. Under the current procedure, the hearing officers at the due process level are state employees working for a separate agency, the Office of

47. *Id.* § 56503(g).
48. *Id.* § 56503(h).
49. *Id.* § 56503(f).

Administrative Hearings.

According to the due process hearings unit, the fifteen-day deadline does not present a problem. Scheduling is done at the state office, and there is always a mediator available. No statistics are kept on this point, but the unit's legal assistant, who is responsible for scheduling, estimates that half of the sessions are held on the original date, and the rest are continued at the request of one of the parties. If a case is not completed in one session or if the original date is changed, the party initiating the due process hearing request usually agrees to an extension of the fifteen-day deadline.

Each year, the California State Department of Education issues a Request for Proposal (RFP) for the position of mediator. The state currently has eight active mediators on contract. Despite the yearly issuance of RFPs, the mediators tend to be long-term employees, some of them having been in the original class of trainees three and one-half years ago. It is a part-time job for all mediators. For some, the part-time nature of the work is compatible with their roles as parents or retirees; for others, special education mediation is just one component of their work, which may include other dispute resolution activities or the private practice of law.

The backgrounds of the mediators are varied. One is a retired school principal and special education director; another has ten years experience in public school teaching and paralegal work, with a specialization in education law. Three of the mediators are self-employed attorneys in the San Francisco area; one of them has an active practice in private sector labor law in addition to the special education mediation. Another mediator has been a college administrator and government worker, and is the parent of a handicapped child. Yet another has a background in counseling.

The mediator's first contact with a case comes in the form of a letter or telephone call from the due process hearings unit, notifying the mediator that a conference has been scheduled for a particular date and time. The parties' names and phone numbers, and perhaps a one-word description of the issue, are provided. Some mediators contact the parties by telephone to confirm the mediation date and to explain the process to those who have not participated in it previously. Others read the child's file, while some make no effort to acquire any additional information.

At the same time that the mediator is notified about the upcoming session, the parties receive a letter from the due process hearings unit containing the same information. The parent is also

sent a "notice of procedural safeguards," which describes the rights of the parties involved in disputes over the provision of a free appropriate public education to individuals with exceptional needs. That notice includes a description of mediation. (Copies of the letter and the notice are attached as Appendices A and B.)

At the conclusion of each mediation, the mediator completes a report that includes the names of the petitioner, respondent, student, and mediator, and specifies whether or not an agreement was reached or a continuance agreed to. If an agreement is reached, a copy is attached to the mediation report and returned to the due process hearings unit in Sacramento. In the case of a failure to agree, a statement of issues is completed by the mediator, signed by the petitioner, and attached to the mediation report. This statement forms the basis of the formal due process hearing, if one is held.

Not every unsuccessful mediation results in a due process hearing. Statistics for 1983 are illustrative. In that year, 183 petitions were transmitted to the Office of Administrative Hearings. Fifteen of these cases were "settled by agreement" after mediation and another fifty-one were withdrawn or cancelled.

V. A Typical Case

On October 1, 1980, a young wife gave birth, prematurely, to twins. One died. The second baby, a girl, survived but, unbeknownst to her parents, had been deprived of oxygen during delivery. This resulted in a mild case of cerebral palsy.

The mother soon sensed that her daughter was not developing properly, but she had difficulty obtaining any diagnosis or assistance. Finally, after taking her to a specialist, she learned that the child had cerebral palsy. The woman set about obtaining the best available services and assistance, and paid a private physical therapist to travel to her home once a week (there were no local qualified therapists) to work with the little girl and teach the mother how best to assist her. When the mother was at her part-time job, the two year-old attended a private nursery school with "normal" children.

Shortly before the girl's third birthday, her mother took her to the local public school and asked for an evaluation of the child and some assistance. She intended to continue to pay the costs of the private nursery school rather than to place the child in the public school's preschool program, where she would be exclusively with handicapped children. However, she wanted the school department

to assume responsibility for the various therapies that her daughter would need in order to benefit from education.

The school acceded to some of her demands, agreeing to provide occupational therapy and consultation with the day-care program, but the mother's request of one hour of physical therapy each week met with resistance. The IEP prepared by the school department proposed one-half hour of physical therapy every two weeks. The mother balked. She knew that the child had been receiving one hour of therapy per week at her own expense. The girl was making progress, and the mother feared that she would regress severely unless this level of therapy was maintained. Nonetheless, the school department refused to modify its position, so the mother rejected the IEP. Her rejection of the IEP triggered the appeal process. The school district forwarded the rejected IEP to the regional mediator and the state's Bureau of Special Education Appeals. A mediation conference ensued.

The mediation took place on the top floor of a Victorian school administration building in the state's poorest city. The mother, a shy, reserved person, was accompanied by an advocate from the State's Office for Children. The special education director was accompanied by the physical therapist who had prepared the original recommendation for one-half hour of therapy every two weeks, and who was the person who would have to provide whatever therapy was given. The nursery school teacher was present. Completing the group were the mediator and an observer.

After introducing herself and asking those present to introduce themselves and sign the attendance sheet, the mediator explained the process. She emphasized its confidentiality, its informality, and the desire that a settlement acceptable to all parties would be achieved. The parent's advocate spoke first. She began by outlining the child's history, the outcome of the team meetings, and the reasons for the parent's rejection of the IEP. The advocate pointed out that there were two separate recommendations in the record for one hour per week of physical therapy, in contrast to the school's offer of what amounted to one-quarter hour per week. The parent's other requests were for more frequent consultation between the school district and the nursery school program, and the provision of therapy (both occupational and physical) throughout the summer.

Then the Special Education Director spoke. She stated the school's position that the child did not need one hour of physical therapy per week, and that the proffered half hour every two weeks

was adequate. She said that the school district already had agreed to greater consultation with the nursery school, and that a summer program probably could be worked out, although the school district's summer plans were not yet final.

The child's teacher, obviously nervous, spoke briefly, observing that the child was doing well. The mediator then separated the parties, moving the Special Education Director and the therapist to another office; for the remainder of the three and one-half hour session, the mediator shuttled from one room to the other.

The mother refused to modify her position. She believed that the child needed one hour per week of physical therapy; she knew that she previously had been paying for it herself and that independent assessments had recommended it; and she thought that the school should provide it.

Although initially maintaining that the child did not need an hour each week of physical therapy, the school people conceded in a private caucus with the mediator that there was a further hurdle: the school district had one physical therapist (who was present) and she simply did not have the time in her schedule to provide this child with a full hour each week.

At the conclusion of one round of private sessions, the case appeared stalemated. The mother (who initially had been too nervous to speak but was gradually participating) appeared to be unyielding. The therapist was aggrieved at having her judgment questioned and her already overbooked schedule potentially swamped. The Special Education Director wanted to help the mother out but believed that she had done all that she could.

At this point the mediator changed the subject. The school already had agreed in principle to the mother's request for greater consultation and a summer program; the details were worked out. At about this time, the teacher, who had said very little, told the mediator that she felt she might have been misleading in her earlier remarks. She said she was nervous, had never participated in mediation before, and had not known what to say. She then described in some detail the child's physical condition and the modifications the nursery school staff needed to make to enable her to participate in the regular daily program of activities.

Then the mediator reconvened the group. Agreements regarding consultation and the summer program were ratified. The teacher gave the school department personnel her view of the little girl's condition, and the special attention and program modification she required; the mother spoke up to say that one reason she wanted

the hour per week was to help maintain the child's determination and her sense that it was important that she do her exercises, even though she often did not want to. The mediator then separated the disputants again.

The mediator caucused with the school representatives. The therapist said that she might be able to find a half hour each week. The Special Education Director told her that she did not have to disrupt her schedule. The therapist offered a specific half-hour slot. The mother rejected the half hour per week. It was clear that she would go to a hearing rather than accept anything less than the hour she had requested. After much juggling of her schedule, the therapist eventually "found" an hour per week.

The resulting agreement reads as follows:

> The currently rejected IEP will be implemented in full with the following modifications:
>
> 1. Physical therapy to be delivered on an individual basis one hour/week. The actual scheduling of physical therapy services can be modified with parental notice (one hour of physical therapy guaranteed).
>
> 2. Physical therapy consultation at the Center to take place once every other month.
>
> 3. Weekly physical and occupational services (therapy) will be provided over the summer months by the LEA. These services will be provided within the time lines of the summer program to be provided by the school system.
>
> 4. This agreement will constitute an addendum to the currently rejected IEP. Acceptance of the agreement constitutes an acceptance of the IEP.
>
> This agreement is in effect from 1/26/84 to 10/28/84.
>
> [parent's and school representative's signatures.]
>
> [printed on form:]
>
> This agreement has been reached through discussion of this child's educational program and plan; the concerns of both parents and school personnel have been voiced and the above agreement has been made in good faith by the parties whose signatures appear above.
>
> If further clarification is needed on any of the elements of this agreement or if this agreement is not carried out by either party, the mediator should be contacted.
>
> [mediator's name and address.]

VI. Discussion: The Mediation Process and Its Results

There is, of course, no such thing as a "typical" mediation. Nonetheless, the mediation that was depicted is similar in many respects to others. The ways in which it differs are also useful in describing mediation in special education.

A. *The Process*

Although mediators have different styles, issues vary in complexity, and the parties are never the same in any two mediations, one thing that is consistent is the structure of the process itself. Interviews and observations of mediations in both California and Massachusetts reveal a striking uniformity in the process.

All mediators begin with a joint session, which includes all the parties. The mediator always begins by introducing himself or herself, then asking the participants to identify themselves. Those in attendance next, generally, are asked to sign a form giving their name, address, telephone number, and relationship to the case. The mediator then begins an introduction to the process. The introduction varies somewhat from mediator to mediator, but certain things always are included. The mediator explains how he or she will proceed, by asking first the parents and then the school to speak. Confidentiality and the informality of the process are stressed, as is the mediator's hope that an agreement can be reached that is satisfactory to all. If an agreement does result, the participants are told that it will be written up and signed by the disputants. Some mediators contrast their own informal proceedings with a due process hearing, pointing out that at mediation the parties can design their own agreements, satisfactory to all, whereas no one wins at a due process hearing and, in fact, everyone loses.

The parents (or their advocate) always are invited to speak first, describing their child, the history of the dispute, and what it is they want. The representative of the school district or education agency then responds. Although the response sometimes includes a comment on the parents' presentation, it may simply be an explanation of why the IEP was written in a certain way. The school's current view of the dispute then is elicited, along with any proposed settlement offers or suggestions. Other people who are present in the joint session, such as teachers and consultants, who may have something to add, are then asked to speak. At the conclusion of the joint session, the mediator reminds everyone that he or she will be speaking privately with one side and then the other in an effort to work out an agreement. Individual sessions with each party then follow. (Only one mediator said that he does not always use individual sessions.) Sometimes the mediator puts each "side" in a separate room and shuttles back and forth; in less spacious surroundings, each group is asked to wait in the hallway or some other

spot while the mediator caucuses with the other disputants. Individual sessions vary in length and number.

In the majority of cases this process leads to an agreement, which is composed by the mediator and reviewed by each side. The parties are brought together for a final joint session, during which the agreement is signed by all disputants. If there is no agreement, the mediator explains to the parents their appeal rights and, in California, writes up a list of outstanding issues for the due process hearing that will follow. This structure is followed virtually without deviation in both of the states that were visited.

B. *Role of Neutrals and Techniques Used*

Literature about mediation often describes the many different roles of a mediator, such as the "distinguisher of wants from needs," the "creator of options," and the "agent of reality," and the techniques used by mediators, such as listening and caucusing. In practice, the special education mediators use all of these techniques. In the case described, the first thing that the mediator did was to take charge of the proceedings. In her introduction, she began to allay some of the mother's apprehensions and reduce her nervousness by speaking directly to her and explaining the mediation process. Then the mediator listened—first to the advocate speaking for the mother, then to the Special Education (SpEd) Director, and then to the teacher. In individual sessions with the parties, the mediator enabled the disputants to elaborate on their positions, as she sought to discover their bottom lines—in other words, to distinguish what the parties said they wanted from what they absolutely needed in order to settle. The mediator's role then shifted, as she shuttled back and forth between the parties, to that of a communicator: someone who listened to and understood what one side was saying and transmitted the message to the other side in a manner that was most likely to induce the other side to understand and, perhaps, modify its position.

Another role that the mediator was called upon to play in the case study was the agent of reality. During one of the private caucuses with the SpEd Director and therapist, after they had begun to look for more time in the therapist's schedule but had come up with only one-half hour per week, the mediator informed the school district representatives that, based on her discussions with the mother, she was quite certain the parents would press on and request a due process hearing unless the school agreed to a full hour per week of service. This news had the desired effect of

increasing the motivation of the school officials to attempt to satisfy the mother. If the news had been delivered earlier, when the therapist was feeling angry and defensive, the SpEd Director might well have rejected out of hand any notions of compromising or, if she had yielded, she would have done so without the support of the therapist.

The agent of reality role is often mixed with the mediator's role as interpreter of the law. In another mediation that was observed, the mediator, after about two and one-half hours in the session, pointed out to the school district representatives that the parents probably had a valid complaint, and that if the case went on to hearing they undoubtedly would have to do something—so why not do it now?

That mediator also played quite skillfully what many believe is the mediator's most important role—the creator of options. In the particular case, the school district representatives, after offering two different placement possibilities (which the parents had rejected), considered that their job was done. They had failed to come forth with any additional suggestions, apparently believing that it was the parents' responsibility to accept one of the two placements that they had offered or to find something better. Thus, several of the mediator's roles converged in one brief private session with the school district representatives. By reminding them of requirements of the law and giving them her candid opinion of the parents' case, she both interpreted the law and acted as the agent of reality. Her intention in doing so was to effect some movement on the school district's part; she wanted it to begin trying to work with the family to come up with an appropriate placement for the child. When that was unsuccessful, the mediator became the creator of options, raising for consideration by the school representatives various placement possibilities. One of these ultimately was accepted on an interim basis.

A more controversial role, which is assumed by some mediators, is the "equalizer of power." Filling this role was not essential in our case study, because the parent was accompanied by an advocate. Nonetheless, the mediator took special pains to speak directly to the mother and try to make her feel comfortable by explaining the process to her in detail. Another of the mediators who was observed was particularly skillful in this regard. He attempted to redress the imbalance of power between the parents and the school district by treating the parents as experts on their own child. Following the introduction, he turned to the parents and, in-

stead of asking that they tell him immediately what they wanted or what their problems were, he asked that they tell him about their child. This technique seems particularly effective in two ways. It makes the parents feel more comfortable by making them an integral part of the proceedings and imparting information that no one else has. It also focuses the attention of all the participants on what they have in common—the child—rather than drawing everyone's attention immediately and exclusively to the issues that divide them.

One technique that seems to be far more prevalent in California than in Massachusetts is the use of continuances. It is becoming increasingly common there to have multiple sessions (generally two but sometimes more). Continuances are used in several ways. It sometimes becomes apparent during the course of a mediation that further information would be helpful. Often a child needs a new assessment, or the school needs to prepare a new IEP, or a parent might fruitfully visit some suggested placements. In other cases, a mediator might suggest a continuance simply to give the parties time to think. One mediator said that if, after several hours, there is no agreement, but she thinks that there has been progress and that there might ultimately be a resolution, she will suggest continuing the case for a week or so to give the parties a chance to digest what has gone on and to reconsider their positions. Another mediator said that if he can get the parties to agree to a continuance, he is almost sure that the case will be resolved. A third mediator described the mediation process as one that involves taking one step at a time, slowly rebuilding the trust of the parties. He finds a continuance a useful way of signifying that one step has been taken and that another will follow. Another instance in which continuances have been used is where a mediator believes that a parent should have an advocate, either because the school district is being particularly rigid, or because the parent has very unrealistic ideas of what is possible or required. In such an instance, the mediator recommends a continuance while the parent secures the assistance of an advocate.

In the course of fulfilling these various roles, particularly as the agent of reality, the equalizer of power, and the interpreter of the laws, does a mediator ever cease being "neutral" and become an "advocate"? This is a troubling question and was viewed as such by those of whom it was asked. One mediator simply said yes, that he does become an advocate in the sense that he perceives it to be part of his job to protect the child's best interests, and to see

to it that the laws and regulations are upheld. One lay advocate said that she would not go so far as to say that the mediators become advocates themselves; however, she objected to the use of the word "neutral." In her opinion, mediators are not neutral because their ultimate loyalty is to the child. She feels that neutrality is not what is required—fairness is. She feels that the two are distinguishable.

It appears, in the context of special education, that the mediator is neutral as between the two disputants: the parents and the school district. Simultaneously the mediator may act as an advocate for the child and a guarantor of the enforcement of Public Law 94-142 and the corresponding state laws.

C. *Identity and Role of Disputants*

Another significant similarity between the mediation described and most cases that go to mediation is in the identity of the disputants. In the overwhelming majority of cases it is a parent who files an appeal that leads to a mediation conference, and the other party is the local school district. School districts also have appeal rights, and they filed ten percent of the petitions in California in 1983.[50] Reasons for a school district's filing of a due process petition include: (1) parent refuses to sign IEP; (2) parent is seeking retroactive tuition payment; (3) school district objects to paying for a private assessment.

Although the identity of the disputants is predictable, one of the more interesting variables is the identity of the actual participants in the mediation. For example, in the case that was described, the mother participated in the mediation, accompanied by an advocate and the child's teacher. The public education agency was represented by the special education director for early childhood education and physical therapist. The therapist had conducted the intitial evaluation of the child, made the original recommendation that was included in the IEP, and would have to provide whatever physical therapy ultimately was delivered.

1. *The Parents*

For the parents, the major decision is whether to go to the mediation conference alone or to bring someone along as an advocate or representative. Many of those interviewed agreed that it is useful for the parents (and, ultimately, for the mediation process) to be accompanied by someone, be it a friend, another parent,

50. No precise figures are available for Massachusetts; school districts there have the same right.

or an advocate. Some parents' groups, like the Federation for Children with Special Needs, believe that parents should always be accompanied to a mediation. One of their major activities is training parents of handicapped children to assume the role of advocate for other parents at IEP meetings, mediations, and due process hearings.

The use of advocates varies widely. In Massachusetts, as in California, there are individuals, known as "lay advocates," who earn their living representing parents and children at mediations and due process hearings. These people are non-lawyers who have had extensive experience in the special education field, working with state and federal laws governing the delivery of special education. For example, one advocate interviewed in Massachusetts is the mother of a handicapped child, who received a Masters Degree in special education and worked for some years for the Federation for Children with Special Needs in Boston. She is now a private lay advocate. The person, who accompanied the mother in the mediation conference described, worked for a state agency that provides free advocacy services to parents and their children.

In Boston, advocates accompany parents routinely, while in central Massachusetts, the use of advocates is minimal. Advocates seem to be used less in California, though their involvement is clearly growing there as well. In 1983, California parents represented themselves at mediation 25 percent of the time. Lay advocates participated in 28 percent of the cases, while attorneys represented the family at mediation in 17 percent of the cases.

Do parents need advocates? Opinion is divided. However, most people interviewed agree that the presence of an advocate is useful. Advocates serve a number of functions. In the case described, the advocate spoke on behalf of the parent in the joint session and outlined the mother's position. This is the advocate's role. The level of participation by the parent varies, but inevitably increases as the session progresses. The mother in the case study was an extremely shy, timid and nervous woman, filled with trepidation at the prospect of a "mediation." Interviewed after the session, the advocate noted that, although mediation is informal and non-threatening to those familiar with the process, it does not appear that way to a parent who is desperately anxious about his or her child and frustrated by the delays in securing services.

An advocate is also useful in lowering the level of tension and emotion. An advocate helps a parent to separate his or her feelings about the child from the relevant facts and issues, and pro-

vides objective information about the law and regulations. One mediator observed that if he believes that an unaccompanied parent is way off base in his or her demands and has a very unrealistic opinion about what is possible or feasible under the law, he will suggest a continuance so that the parent can secure an advocate to help obtain a more realistic assessment of the case. Two private advocates said that they do not always attend mediations with their clients, finding, after reviewing the case with the parents and helping them to prepare a realistic, supportable position, that the parents are able to handle the mediation on their own. This supports the opinion that parents can, with prior assistance, effectively present their own case.

In addition to an advocate, parents often bring with them to a mediation the person who conducted an independent evaluation of the child, if there was one. If the child is in a non-public school, the child's teacher also often accompanies the parents, particularly if the parent is requesting a continuation of the placement.

2. *The School District*

School districts have a number of options concerning attendance at a mediation. Based on interviews and the mediations that were observed, it is clear that they handle participation at mediations in a number of different ways. In some cases, the special education director (known to all in the field as the "SpEd" Director) attends the mediation accompanied by the entire IEP team. In other instances, the SpEd Director attends, but brings only relevant or crucial personnel. (For example, in the case described, the SpEd Director brought the therapist who had prepared the evaluation and would provide the therapy.) Yet another approach is for the SpEd Director to attend the mediation alone, after being briefed by his or her staff.

Another decision that the SpEd Director must make is whether to have any contact with the family prior to a mediation. Most SpEd Directors become involved in a case at the point of impasse—an IEP has been rejected or is clearly headed in that direction, and/or a due process petition has been submitted. Some SpEd Directors become personally involved at that point, and attempt to negotiate a settlement that will avert the initiation or the continuation of a formal due process appeal. Other SpEd Directors choose not to become personally involved until the actual mediation session.

There are pros and cons to each approach. One SpEd Director, who makes no effort to deal with the parties prior to mediation,

said she always attends alone, after a complete briefing by her staff. She uses the mediation to help not only in securing an agreement, but in signaling that the dispute has reached a new, and, she hopes, more productive, phase. Often, by the time a case reaches the point of a formal appeal, so much anger has been accumulated that negotiations are more effective, she believes, when aided by a neutral outsider. Furthermore, in order to foster the sense of change, she does not bring any of the team members with her, or any of the other staff with whom the parents have been dealing. Thus, the parents are confronted at the mediation with a neutral third party, who attempts to win their trust, and an administrator who is new to them and who attempts to communicate her desire to take a fresh look at the case and achieve a satisfactory resolution.

A potential disadvantage of this approach is that the staff and team members whose recommendations are at issue are not privy to the negotiations that ultimately may lead to a reversal of their decisions. In the case described, the SpEd Director accepted her staff's recommendation that the child did not need the hour per week of direct service that the mother wanted. However, she said in a follow-up interview that she was willing to go along with the mother when she recognized how important this therapy was to her. As she observed, no program is going to be very effective if the parent is not happy with it and actively participating. Although she still believed that the child did not need that hour of direct service, she thought it more important to concede the issues and try to build a trusting relationship between the family and the school than it was to stick to the original recommendation. Given that, one can hypothesize that if the SpEd Director had been alone at the mediation, an agreement might well have been reached much more quickly than it was. However, it also may be true that such an agreement would not have provided the therapist with the healing and reconciling aspects of the process. The therapist, throughout the introduction, joint session, and first private caucus, was extremely hostile, defensive, and unyielding. However, she gradually warmed to the mother and to her point of view, and actively began trying to accomodate the mother within her schedule.

In a post-mediation interview, the child's mother observed that she had been nervous about antagonizing the school, and in particular the therapist, and wondered what their relationship would be like following the mediation. She was happy to report that she

and the therapist now have a good relationship, far better than prior to the mediation.

Another approach for a SpEd Director is to bring the entire IEP team to the mediation. One such session was observed. There were thirteen people present, including three observers. Both parents were present and had with them the child's teacher from the private placement and a consultant who had performed an independent evaluation. Participating for the school district were the SpEd Director and the entire IEP team. Only the SpEd Director spoke; nonetheless, the entire team remained for the full mediation session. Some SpEd Directors consciously reject this alternative because they do not want the mediation to resemble a team meeting. Others bring along all possible staff and team members in an effort to intimidate the parent. In the case that was observed, it appeared that the SpEd Director, new to the town, wanted the team members there so that they would understand and accept her ultimate decision, which was contrary to their recommendation.

D. *Time Involved*

The particular mediation described took approximately three and one-half hours. This is within the range generally quoted as "normal"—between one and five hours. However, it is probably on the long side for Massachusetts, but quite typical for California, where mediations seem to take longer and where continuances are more prevalent. Certainly the length of the mediation varies from mediator to mediator; two to three hours seems to be the average. One Massachusetts mediator said that the Bureau thinks two hours should be sufficient.

In terms of the time involved in getting to mediation, the mother stated that she first contacted the school in September to request services. It was November before she was offered, and rejected, an IEP. The mediation was first scheduled for the following month but had to be postponed another month when her child became ill and the mother was unable to attend the mediation. Thus, it took four months from her first contact with the school to the date of the mediation. No statistics are available on this issue; however, based on interviews, it appears to be a fairly typical timespan for Massachusetts. In California, where the mediation conference is included in the forty-five day deadline for completion of the due process hearing and issuance of a decision, mediations are scheduled within fifteen days of the Superintendent's receipt of a request for a hearing. Unless a continuance was granted (due to

the child's illness, for example), the case probably would be resolved more quickly in California.

E. *Proportion of Disputes Resolved*

In California, the number of due process petitions filed has decreased in recent years, from 803 in 1981, to 616 in 1982, and 411 in 1983. The proportion of petitions in which mediation was waived was 31.5 percent in 1981, up to 37.6 percent in 1982, and down to 28 percent in 1983. At the same time, the rate of resolution through mediation has increased. Of those cases where mediation was completed,[51] mediators resolved 45.5 percent in 1981, 60 percent in 1982, and 68 percent in 1983. The percentage of *all* cases filed each year that are resolved through mediation also is increasing. In 1981, 26 percent of the 803 petitions filed were resolved by mediation. That figure was 28 percent in 1982, and 37 percent in 1983.

In Massachusetts, 51 percent of all cases filed in the 1982-83 school year were settled through mediation.[52] According to the Assistant Director of the Bureau of Special Education Appeals, this settlement rate has been holding steady. Several years ago, on the other hand, mediators settled approximately 70 percent of all appeals. The decreased resolution rate is attributed to two developments: (1) an increase in the difficulty of the issues presented (school districts now settle most of the "easy" cases); and (2) the revenue restrictions that followed passage of Proposition 2 1/2, which require some SpEd Directors to have a hearing officer's decision as justification for any significant new expenditure.

Although the resolution rate has decreased in Massachusetts, the number of new cases each year is relatively constant. In 1982, the Bureau of Special Education Appeals opened 1,102 new cases. In 1983, that figure was 1,184 and in the first quarter of 1984, there were 251 new cases.

The case we described would probably have been settled prior to mediation in many school districts, given the relative simplicity of the issue. Non-public school services, particularly private residential placements and, in Massachusetts, cost-sharing conflicts between school districts and state agencies such as the

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51. This computation excludes appeals that were withdrawn prior to mediation or continued until the next year.

52. Although no precise figures are available, there is a waiver of mediation in approximately five to ten percent of the cases, according to the Bureau of Special Education Appeals.

Department of Mental Health, were the most difficult disputes to mediate.

F. *Satisfaction of Disputants*

Interviewed some time after the mediation discussed in our case study, the mother stated that she was very happy with the result of the mediation and surprised that it had been settled that day. Overall, she found the process frustrating, in that it took so long (from September to January) to get what she wanted. However, she had nothing negative to say about the mediation. She found the mediator to be fair and helpful, and thought that her advocate was "wonderful." Her main concern following the mediation was with the quality of the relationship she would have with the therapist in the future; however, that has not turned out to be a problem. The mother indicated that she would not hesitate to use the process again, though she hopes not to have to do so.

The SpEd Director in our case study was generally positive about the process. She believes that the strengths of mediation are that it gives both parties a chance to organize their positions and to review the case, and an opportunity for collective problem solving in an atmosphere where the parents feel supported by an impartial person. Although she still believes that the particular child involved in the mediation does not need the hour of direct service that the mother requested and that the school ultimately agreed to provide, she was not displeased with the outcome. She thinks that the mother may now be more trusting of the therapist and the school system, and that such trust is important in light of the young age of the child and the long-term relationship that exists between the two parties.

Based on interviews with other parents and local school officials, it is clear that disputants overall are extremely satisfied with the mediation process. Although they are not always pleased with a particular mediator or a particular outcome, parents and representatives of school districts were uniformly positive in their evaluation of mediation.

The two groups of disputants—parents and school officials—generally have quite different degrees of exposure to mediation. The parents who were interviewed each had been through mediation once. The school officials each had participated in several mediations, and some in many more. The parents' responses were highly personal and individualized, while the school personnel spoke from a much more detached and generalized perspective.

Nonetheless, their opinions were surprisingly uniform.

Parents are pleased with the process for several different reasons:

"The school district cannot walk all over us;"

"The mediator knew our rights and wouldn't let the school ignore them;"

"The mediator made things a lot easier by being a neutral third party and taking in both sides;"

"The mediator helped us to feel at ease and took the mystery out of the process;"

"We were able to settle the case and learned a lot;"

"It kept us out of a hearing and helped us apply pressure to the district;"

"The mediator listened to me;"

"The mediator helped diffuse tension and keep things focused;"

"We got what we wanted."

Parents did have some negative things to say about mediation. Alluded to by several parents, the expense involved was roundly condemned by one parent, who said he has spend $1,000 on advocate and legal fees. Another mother said that she did not like not knowing what was going on in the other room while the mediator was caucusing with the school officials. She was, however, happy with the outcome. Another mother noted that she fears she now carries with her the "stigma of mediation." It was her feeling that, because she had pressed her case that far, teachers were forewarned about her and were defensive, expecting an ogre. She said that while she has found that attitude difficult to deal with, it generally was overcome as the child's new teachers came to know her. Despite this situation, she would use the process again. Another parent, who went to her mediation unaccompanied, said that she felt like "an outsider" because the mediator and the school's SpEd Director knew each other. Nonetheless, she was not displeased with the outcome, thought the mediator was fair, and would use the process again.

School officials, not surprisingly, have a broader view of the procedure, having had more experience both with mediation and with the due process hearings that often follow unsuccessful mediation. Local school officials are much more likely than the parents who were interviewed to contrast mediation with the due process hearing. That contrast is one of the reasons they are so positive about mediation. School officials focused on the financial, emotional, and personnel costs of a due process hearing, as well

as the utter destruction of any remaining good feeling between parents and schools in the course of the due process hearing. As one local SpEd Director put it, "I go to a mediation with an open mind and hope to reach an agreement. I go to a hearing to win."

G. *Nature and Effect of Imbalances of Power Between Disputants*

Interviews reveal widely divergent opinions on this subject. Most parents and advocates believe that there is a power imbalance, which favors the schools. Some school district representatives seem to feel that there is no such power imbalance; others argue that an imbalance exists, but in favor of the parents. One mediator noted that he thought that disputants on both sides felt that the other side had greater power.

Regardless of whether it is real or imagined, it is clear that parents think that the schools have significantly more power than they do. Explanations varied, but some comments recurred. It was pointed out repeatedly that "knowledge is power," that is, the school districts are experts in the law and the procedures, whereas parents are uninformed neophytes. Parents also tend to feel overwhelmed by the sheer numbers of school personnel, psychologists, and experts who routinely attend IEP meetings and, sometimes, mediations. And, as one observer pointed out, the whole process of dealing with a school system evokes memories of the parents' own childhood, and makes him or her, subconsciously perhaps, feel childlike, helpless, and subservient.

One effect of this perceived imbalance of power is the formation of parents' groups like TASK (Team of Advocates for Special Kids) and the Federation for Children with Special Needs. These groups believe that with sufficient training parents can assume the role of advocate for other parents at IEP meetings, mediations, and even due process hearings, but that unaccompanied parents are at a distinct disadvantage. Parents without such training and support are turning in increasing numbers to professional lay advocates, non-lawyers with expertise in special education who assist them in preparing for and attending mediations and, if necessary, due process hearings.

In the "typical" case we described, the mother clearly believed that the school officials had significantly more power than she. She may still believe that, because of the emotional costs associated with the process. In fact, however, the case ultimately was settled in her favor, in large part because of the school district's recognition of the parent's ultimate power: the right to

take the school district through a costly due process hearing.

H. *Satisfaction of Interest Groups*

All of the representatives of interests groups who were interviewed for this study said that they, and the groups they represent, are enthusiastic about the mediation process and generally recommend to parents that they take advantage of the mediation option. One person, a private advocate, said that he is unabashedly in favor of mediation, describing it as an "effective way to introduce a sane, reasonable person into the proceedings." These interest groups seem to be supportive of mediation because it is relatively informal, effective, and far less time consuming and draining of emotional and financial resources than the formal due process hearing. The most negative note was sounded by one Massachusetts advocate, who stated that, although he generally favors mediation, he questions its fundamental fairness because of the imbalance of power between the parties. He believes that this imbalance can be redressed somewhat by the presence (or the coaching beforehand) of an advocate. The staff at one parent-run organization stated that they always recommend attempting mediation because they consider that it shows good faith and that, even if no settlement is possible, issues at least can be narrowed. They believe that the parents lose nothing by trying mediation.

In California, mediation is becoming even more popular than it has been with interest groups that support parents and children because of their perception that decisions by hearing officers are becoming increasingly conservative and favoring school districts. Statistics bear them out. In 1983, of the eighty-two petitions in which there was either a decision in favor of the district, a decision in favor of the parent, or a split decision,[53] 63 percent resulted in a decision in favor of the district, 24 percent resulted in a decision in favor of the parent, and 12 percent resulted in a split decision. In contrast, in 1981 there was a decision in favor of the district in 39 percent of the cases, a decision in favor of the parent in 44 percent of the cases, and a split decision in 17 percent of the cases.

I. *Use of Information Developed Through Informal Processes*

When a mediation results in an agreement, as it did in our ex-

53. Petitions that were settled by agreement, withdrawn, or pending at the end of the year were not included in these computations.

ample, a written agreement is produced. This is the only product of the session, except for a brief report indicating the outcome—agreement, no agreement, or continuance. In the case of a failure to agree, California mediators prepare a list of issues for the due process hearing, which is signed by the petitioner. No record is kept of anything that was said at the mediation. In Massachusetts as well, the mediation conference is entirely confidential. Massachusetts court decisions treat what occurs in a mediation as offers of settlement, which are inadmissable as evidence.[54] The only exception is that testimony concerning what occurred in the mediation is admissible to show that a parent had prior knowledge of, for example, the availability of a program that the school was offering. In neither state has there been any subpoenas of the mediators or of any files. Both programs insist on total confidentiality of what occurs in the mediation and would attempt to have any such subpeona quashed.

J. *Use of Precedent*

In discussing the use of precedent in mediation, it is necessary to distinguish among a number of items, ranging from federal law to mediated agreements.

The federal statute, Public Law 94-142, forms the backdrop against which all due process activity in special education takes place, since it sets the standards which must be met. However, the more relevant law to mediators and parties is the pertinent state statute—in Massachusetts, Chapter 766, and in California, the Education Code—which conforms to Public Law 94-142. These state laws and the regulations implementing them play a vital role in virtually all mediations.

Court decisions, as well, are relevant precedents, and are read widely by mediators, advocates, and educational administrators.

Decisions by hearing officers, on the other hand, technically cannot be used as precedent for other decisions. However, these decisions are circulated among mediators in each state, and advocates, school officials, and other interested parties regularly review them. Although it is often said that one can never predict the outcome of a hearing, nonetheless, hearing officer decisions are turned to by mediators and by the parties as an objective standard by which to judge the possible merits of one's position on any given issue.

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54. *See, e.g.*, Enga v. Sparks, 315 Mass. 120, 51 N.E.2d 984 (1943).

Mediated agreements are not circulated or read by anyone and have no precedential value in future cases.

This range in the impact of different decisions and enactments does not seem to create problems. Indeed, it seems appropriate to recognize the differences between decisions made according to legal standards and agreements based on the needs and wishes of the parties, although with knowledge of the possible alternatives.

K. *Policy and Systemic Changes*

Persons interviewed in both states minimized the level of policy or systemic changes that have resulted from either mediation or from due process hearings. State educational officials and mediators interviewed for this study in California offered one example, a clarification of new special education eligibility criteria, of a systemic or policy change resulting from mediation. This change was made because of the volume of cases in which the new eligibility criteria was an issue, and the concern percolated up to departmental administrators.

One state department of education official who was interviewed said that he periodically reads hearing officers' decisions and believes that mediators should do so, also. However, he also said that there have been very few policy changes brought about by the due process system. A state education official in Massachusetts said that he meets periodically with personnel of the Bureau of Special Education Appeals to discuss recent cases. He uses these conversations and occasional reading of decisions to flag issues that may be ripe for review or action at his level.

VII. CONCLUSION

We commenced this research to discover whether one type of dispute between individuals and institutions can be mediated successfully. In the special education field, the answer is a resounding "yes." Satisfaction with the mediation processes studied in Massachusetts and California is broad and deep.

Whether the success of mediation in the special education field can be transferred to other types of disputes between individuals and institutions is an open question. The special education context includes a number of features that may or may not be present elsewhere:

— A continuing relationship between the disputants, parents and school districts, which lasts for as long as the child is in school—potentially eighteen years;

— Multi-issue disputes in which there is much room for judgment, disagreement, creativity and, therefore, negotiation;
— Disputes over plans for the future, as opposed to actions in the past;
— Well-trained, skillful mediators, who are knowledgeable about both legal and educational issues;
— Active advocacy groups, which educate parents about their rights under the law and, on occasion, represent them at mediations and hearings;
— Individual claimants who come from all socio-economic and ethnic groups;
— A complex, yet clear, framework of laws, which have been enforced consistently;
— Federal and state statutes, which created extensive new entitlements for individuals and gave them the right to initiate and pursue their due process safeguards annually;
— A burdensome alternative to mediation—the formal due process hearing; and
— A community of interest between the disputants: the education of the child, who has needs to which all parties to these disputes generally are sympathetic.

We believe that all of these considerations contribute to the success of the program studied. However, without comparative research, it is impossible to identify which of them is critical.

One of the features traditionally seen as contributing to the success of mediation is the existence of an ongoing relationship. Obviously, that situation exists in the special education context. Public Law 94-142 and analogous state enactments give special needs children substantive and due process rights starting at age three and extending through the age of twenty-one. In addition, the statutory framework gives the parents the right to exercise their due process safeguards once a year. Interviews with local school officials indicate that this consideration inclines them toward attempting an amicable settlement. It is less clear what effect this continuing relationship has on the parents. It may well propel parents to assert their rights early in their relationship with the schools, or whenever necessary, so that the schools will not take them for granted or fail to consult with them. So, conceivably, the ongoing relationship encourages the exercise of parental rights. On the other hand, the same consideration could incline parents toward settlement at mediation, by which time they might legitimately believe that their power had been demonstrated to the

school district.

Another significant aspect of the special education context is that none of the disputes involves simple "yes" or "no" decisions. At issue is not whether a person does or does not qualify for public assistance or admission to medical school, for example; at issue in almost every case is an educational plan, which consists of many components and possibilities. One can speculate that the orientation towards the future and the complexity of the matters in dispute create a situation in which there is much room for negotiation and creative problem-solving.

Many people who were interviewed qualified their support of mediation with the statement, "it all depends on the mediator." Given the highly personal nature of the mediator's role, their skill is clearly a major factor in the success or failure of the process. Only one of the mediators in California and Massachusetts was rated ineffective by the people we interviewed. The ones we observed were very good; some of them were excellent. Their dispute resolution skills, sensitivity, and substantive knowledge of special education and the law certainly have had a significant and positive effect on the two states' programs. The assistance of well-trained advocates also contributes to the success of many mediations.

One can only speculate about the significance of the fact that the parents involved in these cases are not all poor or members of minority groups. Certainly the fact that handicaps and learning disabilities strike the rich as well as the poor has increased the visibility of special education issues, and perhaps, pressure on administrators to humanize their programs.

The consistency with which the laws have been enforced is clearly important. Many persons mentioned in the course of interviews that school districts have "finally gotten the message" about the meaning of the laws and what they are required to do to satisfy various statutory and regulatory requirements. Not all school districts are in compliance, but evidently many are making a concerted effort to comply with the laws.

Another very strong inducement to settlement is the specter of the alternative to settlement—a full blown due process hearing. The aversion to this process, noted by long time observers in Massachusetts,[55] remains, and is clearly a motivating factor contributing to the resolution rate.

Public Law 94-142 mandated collaboration between parents

55. *See* BUDOFF, *supra* note 1.

and school districts in the interest of educating children with special needs. Perhaps, ultimately, the reason that mediation is so successful in this arena is that it is a process that nutures rather than destroys the trust and cooperation that the framers of the governing statutes envisaged among people with an interest in the education of special children.[56]

56. This article was presented as a report to the National Institute for Dispute Resolution. We would like to thank Barry Zolotar, Assistant Chief Counsel, California State Department of Education, and Carol Kervick and Stephen Bardige, Director and Assistant Director of the Bureau of Special Education Appeals in the Massachusetts State Department of Education, who consented to our conducting a study of their mediation processes. Special thanks also to Eva Zeleny, in Sacramento, for her excellent advance work prior to our California site visit. In addition, we want to express our thanks to those people who agreed to share their views with us or to have us observe mediations in which they participated.

APPENDIX A

LETTER TO PARTY REQUESTING A DUE PROCESS HEARING IN CALIFORNIA

Your request for a due process hearing has been received. In order to comply with the 15 day time limit prescribed by Education Code § 56503(b), the above case has been scheduled for a mediation conference as follows:

DATE:

TIME:

PLACE:

While the average length of a mediation is approximately three hours, a mediation may last an entire day. The success of mediation is dependent on the commitment of both parties to try to work toward a mutually satisfactory resolution. In order to accomplish this goal, it is requested that both parties arrange their schedule to permit them to participate in mediation throughout the entire day.

The Mediator assigned in this case is:

A statement of the background and experience of the Mediator is enclosed.

All requests for continuances or change in date shall be directed to the Mediator via telephone and confirmed by letter.

Any party may waive mediation and proceed directly to a due process hearing. If you wish to waive mediation, please advise this office immediately by telephone, and confirm your waiver by letter, mailing copies to all other parties and the Mediator. In compliance with Education Code § 56502(c), a copy of the Notice of Procedural Safeguards is enclosed for your information.

By copy of this letter, any public education agency a party to this proceeding is advised of its responsibility pursuant to Education Code § 56502(c) to advise the parent of free or low-cost legal services and other relevant services available within your geographical area.

Sincerely,

BARRY A ZOLOTAR
Assistant Chief Counsel

By

EVA ZELENY, Legal Assistant
Due Process Hearing Unit, Rm. 637
(916) 323-8615

BAZ:ez
Encl.
cc:

APPENDIX B

NOTICE OF PROCEDURAL SAFEGUARDS (IN CALIFORNIA)

INTRODUCTION

Both state and federal law provide that "individuals with exceptional needs" are entitled to a "free appropriate public education." Those laws require that the parent or parents of those individuals and the public education agency responsible for their special education receive a written notice of their procedural rights. This document is intended for the purpose of complying with that requirement.

Preliminarily, a few definitions are in order. The federal law speaks of "handicapped children", while the laws of the State of California refer to "individuals with exceptional needs". For purposes of this document, these terms mean the same thing, and in the interest of uniformity, the latter term will be used throughout. As used in this document, "educational agency" means the public educational agency responsible for providing special education to an individual with exceptional needs. "Superintendent" means the Superintendent of Public Instruction of the State of California, or designated members of the Staff of the California State Department of Education.

You will note certain notations in the left margins of this notice. These are citations to the places in law and regulations where you can find the source of the right being discussed. All citations to state laws are found in the Education Code of the State of California, and are indicated by "EC" followed by a section number; state regulations are found in Title 5, California Administrative Code and are indicated by "CAC" followed by a section number; or Federal

Regulations are found in Title 34, Code of Federal Regulations, Part 300 or Part 104, indicated by "CFR" followed by a section number.

I. When Rights Come Into Effect

A. Both the parents and the educational agency have significant legal rights in connection with the special education of an individual with exceptional needs. These rights become operative when there is:

EC §56501(a)
CFR 300.506
CFR 104.36

1. A *proposal* or *refusal* by either party to initiate or change the identification, assessment or educational placement of an individual with exceptional needs, or the provision of a free appropriate public education to the child.

This most often occurs in connection with the development of an "individualized education program" (IEP) for the individual with exceptional needs. However, any disagreement regarding the proposals or refusals described above, are appropriate issues for the Due Process Hearings and either or both parties have the right to initiate a Due Process Hearing petition which will be discussed in detail below.

CFR 300.504
CFR 300.053
CFR 104.36

B. A reasonable time before the educational agency proposes or refuses to initiate or change the identification, assessment or educational placement of an individual with exceptional needs, or the provision of a free appropriate public education to the child, the educational agency is required to give the parents a written notice notifying them of its intentions. The contents of that notice are prescribed in the Education Code and Code of Federal Regulations, and must include a full explanation of the procedural safeguards available to the parent, a description and explanation of the action the agency proposes or refuses to take, a description of the information which is the basis of the action and all other relevant factors.

II. Initiation of a Due Process Hearing

EC §56502(a)
EC §56505
CFR 300.512

A. A Due Process Hearing is initiated by filing a written request with the Superintendent. The party filing the request is required to provide the other party with a copy of the request at the time it is filed with the Superintendent. Within three (3) days of the time an educational agency receives a copy of the request, it must advise the other party of any free or low-cost legal or other relevant services in the area. The law further requires that the hearing must be held, and a decision mailed to the parties within forty-five (45) days of the time that the Superintendent receives the request.

III. Right to a Mediation Conference

EC §56502
EC §56503

A. The parties have a right to a mediation conference. When the Superintendent receives a request for a Due Process Hearing, the Superintendent or his/her designee, is required to immediately notify, in writing, both parties of the request, and the proposed date, time and place of the mediation conference. The notice must advise both parties of their rights relating to procedural safeguards (this document is intended to be that notice).

B. The parent and the educational agency may meet informally before the mediation conference to attempt to resolve the disagreement if the party initiating the hearing chooses to do so.

C. A mediation conference will be scheduled and held unless mediation is waived by one or both parties. In the event the mediation conference is waived, the matter proceeds directly to a state hearing.

D. A mediation conference is designed to be an informal non-adversarial opportunity for the parents and the educational agency to resolve the educational disagreement. The mediation is conducted by a person under contract with the State Department of Education who is knowledgeable in the laws governing special education.

E. Parents may be accompanied by represen-

tatives of their choosing.

F. The mediation conference must be completed within fifteen (15) days after the Superintendent received the request for hearing, unless either the parent or educational agency requests the scheduled data for the mediation to be changed and the continuance is granted by the mediator. The mediator may grant a continuance if there is good cause. A continuance will not extend the forty-five (45) day maximum for rendering a decision unless the party initiating the hearing agrees to the extension. A continuance will only extend the forty-five (45) day maximum for a period of time equal to the length of the continuance.

G. The mediation conference must be held at a time and place reasonably convenient to the parent and pupil and the parent has the right to examine and receive copies of the child's educational records before the mediation conference.

H. Any agreement reached by the parties in the resolution of the issues of disagreement must be to the satisfaction of both parties and must be consistent with the requirements in Federal and State law.

EC §56503

I. If, at the mediation conference, there is no resolution of the issues to the satisfaction of both parties, a Due Process Hearing will be held. In that event, the mediator will prepare a list of any unresolved issues. That list shall be approved by the party initiating the hearing and shall be the basis for the Due Process Hearing.

IV. Conduct of the Hearing

EC §56505

A. There are specific requirements in both Federal and State laws and regulations regarding how the special education due process hearings must be conducted and the rights the parties have before, during and after the hearing.

1. The state hearing must be conducted by a person knowledgeable in administrative hearings under contract with the Department of Education; at this time, an attorney with the Of-

fice of Administrative Hearings will be assigned as your Hearing Officer. This Hearing Officer is knowledgeable in the laws governing special education and administrative hearings.

CFR 300.512

2. The hearing must be held at a time and place reasonably convenient to the parent and the pupil.

CFR 300.513

3. During the hearing proceedings, including the actual state-level hearing, and until the decision is rendered and is in effect, the pupil must remain in his or her present placement unless the public agency and the party agree otherwise. This also applies if either party appeals the hearing decision to the court.

EC §56505
CFR 300.508
CFR 104.36

4. Both parties to the hearing are afforded the following rights consistent with state and federal statutes and regulations:

(a) The right to be accompanied and advised by counsel and by individuals with special knowledge of training relating to the problems of handicapped children.

(b) The right to present evidence, written arguments, and oral arguments.

CAC § 3081

(c) The right to confront and cross-examine witnesses. This includes the right to call witnesses, including adverse witnesses. The parties may compel the attendance of witnesses. The hearing officer shall have the right to issue subpoenas (order to appear and give testimony) and subpoenas duces tecum [order to produce document(s) or paper(s)] upon a showing of reasonable necessity by a party.

(d) The right to a written or electronic verbatim record of the hearings.

(e) The right to written findings of fact and the decision.

(f) The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to the party at least five (5) days before the hearing. This disclosure must include, at a minimum, a list of the witnesses

who are expected to be called, with a general statement of what they will testify to, together with copies of any documents or papers that will be offered in evidence. If disclosure is not made to the other party in advance, in accordance with this requirement, upon objection made by the party, this evidence may not be received at the hearing. It follows from this that if your presentation at a Due Process Hearing is to be effective, *you should be prepared.* You should be prepared to offer evidence and produce witnesses who will be able to testify under oath in support of your position. This means that you should spend some time preparing your case and planning your strategy *before* the day of the hearing.

(g) The right to have witnesses excluded from the hearing, upon motion to the hearing officer and absent compelling circumstances to the contrary.

CAC §3081

5. Hearings will be conducted in the English language; when the primary language of a party to a hearing is other than English, or other mode of communication, an interpreter will be provided who is competent as determined by the hearing officer. The cost for the interpreter will be borne by the State Department of Education.

CAC §3081

6. The hearings will not be conducted according to the technical rules of evidence and those related to witnesses. Any relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but will not be suffi-

cient in itself to support a finding unless it would be admissible over objection in civil actions. All testimony will be under oath or affirmation which the hearing officer is empowered to administer.

EC §56505
CFR 300.512

7. The hearing will be completed and a written, reasoned decision mailed to all parties to the hearing within forty-five (45) days from the receipt by the Superintendent of the request for hearing. Either party to the hearing may request a continuance. The continuance will be granted upon a showing of good cause. Any continuance will extend the time for rendering a final administrative decision for a period only equal to the length of the continuance.

EC §56507

8. Both parties have the right to be represented at all stages of the proceeding by an attorney or other representative of their choosing. The educational agency's right to be represented by an attorney is somewhat restricted, however. Specifically, the educational agency may not initiate the use of an attorney for the actual presentation of written argument, oral argument, evidence or any combination thereof during a mediation conference, individualized education program meeting or Due Process Hearing *unless* all of the following occur:

(a.) The education agency notifies the parent, in writing, of its use of an attorney at least three (3) days prior to the mediation conference or individualized education program meeting or at least ten (10) days prior to the Due Process Hearing.

(b.) The educational agency provides the parent with a list of attorneys knowledgeable regarding mediation conferences, individualized education program meetings and Due Process Hearings.

(c.) The educational agency must pay the parents' attorneys' fees if said agency in-

> ıtıates use of an attorney for the purposes ın-dicated above, subject to the limitatıon that those fees may not exceed the cost of the agency's own attorneys' fees.

If the parent ınitıates the use of an attorney durıng the mediatıon conference or Due Process Hearıng, or ındıvıdualized educatıon program, the parent must notify the educatıonal agency, ın wrıtıng, or hıs/her use of an attorney at least three (3) days prıor to the mediatıon conference, or ın-dıvıdualized educatıon program meetıng or at least ten (10) days prior to the Due Process Hear-ıng. If the parent ınitıates the use of an attorney, the educatıonal agency may use an attorney; ın that case each party pays its own attorneys' fees.